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YOGENDRA SINGH KANWAR
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Date: 2025.02.06 12:53:17 +0530

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

Cr.A.No. 61 /93

Appellant: Phulchand,
Accused
(In Jail) aged about 22 years,
son of Sunder Khairwar,
resident of village Tiharitola –
Beljhiriya, Police Station Manerhi,
District Bilaspur, M.P.

versus

Respondent: The State of Madhya Pradesh

CRIMINAL APPEAL UNDER SECTION 374(2)
OF THE CODE OF CRIMINAL PROCEDURE, 1973

9861

Filed on 30/1/93
by Shri Arun Kochar Advocate

D.R.
30/1/93

(27)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No. 61/1993

Phulchand

Vs.

State of Chhattisgarh

Judgment for consideration

Sd/-
Dilip Raosaheb Deshmukh
Judge
16.08.2005

HON'BLE SHRI JUSTICE V.K.SHRIVASTAV

I agree

Sd/-
V.K.Shrivastava
Judge

Post for 23.08.2005

Sd/-
JUDGE
.08.2005

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr.Appeal No.61/1993

Phulchand

-Versus-

State of Chhattisgarh

CORAM: HON'BLE SHRI V.K.SHRIVASTAVA AND HON'BLE SHRI DILIP RAOSAHEB DESHMUKH, JJ

Appellant by Shri Arun Kochar, Advocate.

State by Shri J. D. Bajpai, Govt. Advocate/Addl. Public Prosecutor with Shri Ravindra Agrawal, P.L.

J U D G M E N T

(Delivered on 23.08.2005)

Per Dilip Raosaheb Deshmukh, J.

This appeal is directed against the judgment dated 7th January 1993 delivered by Shri M.C. Jain, 4th Additional Sessions Judge, Bilaspur (M.P.) in sessions trial No. 418/1991 whereby the appellant was convicted under Section 302 I.P.C. for committing murder of Bhuda and also under Section 323 I.P.C. for voluntarily causing hurt to Sahadev and Shyam Sunder and sentenced to imprisonment for life under Section 302 I.P.C. and rigorous imprisonment for three months under Section 323 I.P.C.

2. Briefly stated prosecution story is that on 29.5.1991 at about 3.00 P.M. while Kunnilal P.W.3 was sitting at his brother P.W.2 Sahadev's house, the appellant on a personal dispute went there and slapped Kunnilal. Sahadev P.W.2 requested the accused-appellant with folded hands not to beat Kunnilal

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whereupon the appellant assaulted Sahadev P.W.2 by a lathi on the left cheek near the lower eyelid. Sahadev P.W.2 fell unconscious. Seeing this, Bhuda came running and was lifting Sahadev P.W.2 when the appellant again came there with a lathi and assaulted Bhuda twice on the head. Bhuda succumbed to the head injury on the spot. Thereafter, the appellant ran away. Keshar Bai P.W.5, wife of Bhuda and neighbour Shyam Sunder P.W.4, saw the entire occurrence. The appellant also wielded the lathi on Shyam Sunder who sustained a simple injury. The appellant also ran towards Keshar Bai P.W.5 but she ran away and narrated the incident to her uncle Alkharam who lodged the F.I.R. Ex.P.1 in Police Station Marawahi. Inquest was conducted by Sub-Inspector S. K. Singh vide Ex.P.3. who seized blood stained soil and plain soil from the place of occurrence vide Ex.P.5 and seized one piece of wood 3 feet in length and burnt from one side, from the *Badi* of the appellant on 30.05.1991 vide Ex.P.6.

3. Post-mortem was conducted by Dr. Ramesh Singh Kachhawaha P.W.10 on the dead body of Bhuda on 30.05.1991 who found vide Ex.P.8 that the face was stained with blood. There was a diffused swelling of 12 cm. circumference on left frontol parietal region of scalp with red and bluish discolouration of underlying skin. Another incised wound was present on posterior aspect of left parietal bone 5"x3" x cerebral cortex level. Upon dissection, he found fracture of left parietal bone anterior side and frontol bone left side as well as fissured fracture of left parietal bone on posterior side through which cerebral cortex was seen.

Laceration of cerebral cortex frontal and parietal and extra dural haemorrhage was also noticed. Dr. Kachhawaha P.W.10 opined that death was due to coma as a result of brain stem compression by raised intra-cranial tension due to depressed fracture and fissured fracture of left parietal bone and frontal bone of skull and extra dural haemorrhage due to head injury produced by assault by a hard and sharp weapon.

4. Dr. R.D.Gupta P.W.9 who examined Sahadev on 30.05.1991 found vide Ex.P.9-A a contusion 2 cm. x 1 cm. just below lower eye-lid and a lacerated wound 1 cm. x 1/2 cm. x 5 cm. on the base of right meta-carpophalynges of index finger palmer aspect. Both these injuries were simple in nature as opined by Doctor R.D.Gupta in his report Ex. P.9-A. He also examined Kunnilal P.W.3 on 30.05.91 and reported vide Ex.P.10-A that no external injury was seen though he only complained of pain over the left ear. Shyam Sunder P.W.4 was also examined by him on 30.05.1991 and one lacerated wound 1 cm. x ½ cm. x skin level was found but the location of injury was not mentioned in his report Ex.P.11-A.

5. After completion of investigation, the appellant was prosecuted for offences under Section 302 and 323 I.P.C. The appellant abjured the guilt, pleaded false implication due to a dispute with Shyam Sunder P.W.4 but led no evidence in defence. Prosecution examined as many as 11 witnesses. The learned trial Judge relying upon the testimony of Kunnilal P.W.3, Sahadev

P.W.2, Keshar Bai P.W.5, Shyam Sunder P.W.4 and the medical evidence of Dr. Ramesh Singh Kachhawaha P.W.10 and Dr. R.D.Gupta P.W.9, convicted the appellant under Section 302 and 323 I.P.C. and sentenced as aforesaid. It rejected the contention of defence that the offence committed by the appellant did not travel beyond 304 part II of the I.P.C. on the ground that the appellant repeatedly assaulted Bhúda though he had fallen after receiving the first blow by lathi.

6. Learned counsel for the appellant has argued that there is serious contradiction between medical evidence and the ocular evidence. Shyam Sunder P.W.4 and Keshar Bai P.W.5 have spoken about the assault by the appellant by a lathi whereas Dr. Ramesh Singh Kachhawaha P.W.10 had found an incised wound 5 cm. x 3 cm. on the cerebral cortex level on left parietal bone and had opined in his report Ex.P.17 as well as in paragraph 8 of his testimony that this injury was smooth, clean cut and had well defined margins and could be caused by a sharp weapon like blade. The learned defence counsel therefore contended that the testimony of ocular witnesses could not be relied on. He placed reliance on *Ravi Kumar v. State of Punjab* reported in **2005 Cr.L.J. 1742** and *State of Rajasthan v. Bhanwar Singh* reported in **IV (2004) CCR 8 (SC)**. In the alternative, the learned counsel also contended that as per Kunnilal P.W.3 and Keshar Bai P.W.5, the appellant had merely slapped Kunnilal. Kunnilal P.W.3 and Shyam Sunder P.W.4 also did not speak about any assault by the appellant on Sahadev by lathi. Shyam Sunder P.W.4 had also

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stated that he did not see the article by which the appellant had assaulted Sahadev. Thus the appellant was unarmed when the incident began. The appellant did not intend to cause the death of Bhuda and had assaulted him in a sudden heat of passion, therefore, the offence, if any committed by the appellant could not travel beyond Section 304-II of the I.P.C. It was also contended that since the appellant was in jail since 31st May 1991 and had already undergone incarceration till 16.1.2001 i.e. for over nine and half years, custodial sentence already undergone would meet the ends of justice. Learned defence counsel placed reliance on *State of Madhya Pradesh v. Jhaddu and others* reported in **1991 SCC (Cri) 716.**

7. On the other hand, the learned additional public prosecutor vehemently argued in support of the judgment of the trial Court and contended that the repeated injuries caused by the appellant on vital part of Bhuda clearly was an act of deliberation and established that the appellant intended to cause the death of Bhuda. He, therefore, argued that the conviction of the appellant under Section 302 I.P.C. was well founded.

8. We have considered the rival submissions and have also gone through the record of the lower Court. Scanning the evidence led by the prosecution, we find that it is clearly borne out from the evidence that the appellant Phulchand had caused the death of Bhuda. Keshar Bai P.W.5, the widow of the deceased, has deposed that the incident started when the appellant slapped Kunnilal and

thereafter assaulted Sahadev with a stick, who fell unconscious. Seeing this, her husband Bhuda ran to pick up his father Sahadev. In the meanwhile, the appellant who after assaulting Sahadev had gone to the house of Kunnilal returned with a lathi and while Sahadev was lifting Bhuda, dealt one blow by the lathi on the head of Bhuda, as a result of which, Bhuda fell down. The appellant dealt two more lathi blows on Bhuda who had fallen on the ground. In cross-examination paragraph 5 of this witness, the appellant took the defence that he had a small Bidi shop and sometimes used to sleep at the shop at night and the appellant had complained to Bhuda as to why did he visit his wife when he was not present. Though this witness has denied the above allegations, yet it appears that this may be the root cause for the annoyance of the appellant. No other motive has surfaced from the evidence led by the proseuciton.

9. Shyam Sunder P.W.4 has corroborated the testimony of Keshar Bai P.W.5. This witness had seen the occurrence from the *Badi* of his house. In cross-examination, he has clearly denied that the place of occurrence is not visible from the *Badi* of his house. He has deposed that while he was at the back of his house, he heard shouts and saw that the appellant had assaulted Sahadev who fell on the ground. The appellant ran away and it was at this point of time when Bhuda came running and was lifting his father Sahadev that the appellant dealt one lathi blow on the head of Bhuda which fell him down. Thereafter, the appellant dealt two more lathi blows to Bhuda. According to this witness, the

appellant had wielded the lathi on him also whereupon he had also sustained injury on left hand.

10. Kunnilal P.W.3 has also corroborated the testimony of Keshar Bai P.W.5 and Shyam Sunder P.W.4 relating to the assault by the appellant on him and Sahadev. According to him, the appellant was empty handed and slapped him whereupon he started crying. Thereafter, the appellant slapped Sahadev. After this, he ran away. Sahadev P.W.2 has stated that the appellant was empty handed when he assaulted Kunnilal and on his prayer the appellant picked up a wooden piece (though he is not certain as to what hit him) and hit him above the left cheek whereupon he fell unconscious. After regaining consciousness, he found that his son Bhuda was lying in the *Purchee* with injury on the head and was dead. Sahadev P.W.2 and Kunnilal P.W.3 have not made any effort to implicate the accused appellant for an act which they had not seen and in our well considered opinion their unrebutted testimony is trustworthy.

11. The ocular evidence is also corroborated by the evidence of Dr. R.D.Gupta P.W.9 who vide Ex.P.9-A had found a contusion near the left eye lid and a lacerated wound on the right index finger of Sahadev. The contusion near the left eye lid obviously was the injury due to which Sahadev became unconscious. He also found a lacerated wound on Shyam Sunder. So far as the injury sustained by the deceased Bhuda is concerned, the testimony of Dr. Ramesh Singh Kachhawaha P.W.10 shows that Bhuda had sustained incised injury 5 cm. x 3 cm. x level of cerebral cortex on

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left parietal region which according to this witness was caused by a hard and sharp object. There was a diffused swelling in an area of 12 cm. on the left fronto-parietal region with depressed fracture of frontal and parietal bone underneath which had proved fatal. There was a fissured fracture of parietal bone also. Extra-dural haemorrhage was also noticed and cerebral laceration of frontal and parietal cortex was also found. Learned counsel for the appellant has argued that Dr. Kachhawaha has in paragraph 8 of his testimony clearly stated that the incised injury on Bhuda could be caused by a sharp weapon, and therefore, the medical evidence is in variance with the ocular testimony which therefore could not be relied on.

12. We have gone through the testimony of Dr. Kachhawaha P.W.10 and we find that no clarification was sought from this witness as to whether the incised injury on Bhuda could be caused by the lathi which was seized from the *Badi* of the appellant. In view of the consistent ocular evidence on record that the appellant had assaulted Bhuda repeatedly by lathi which is also corroborated by the F.I.R. lodged by Alkharam, it appears that Dr. Kachhawaha who conducted the autopsy misjudged the lacerated wound caused on the left parietal region to be an incised wound. In Modi's text book of jurisprudence and toxicology 16th Edition at page 224, it has been mentioned that "occasionally on wounds produced by a blunt weapon or by a fall the skin splits and may look like incised wounds when inflicted on tense structures covering the bones, such as the scalp, eye brow, iliac crest, shin,

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etc. or by a fall on the knee or elbow when the limb is flexed". This has also been relied by the Apex Court in the case of *Ravi Kumar v. State of Punjab* reported in **2005 Cri.L.J. 1742.** In view of what has been stated by Modi in his text and also in view of the fact that no clarification has been sought from Dr. Kachhawaha during cross-examination that the injury could not have been caused by the lathi which was seized vide Ex. P.6, the inconsistency between this part of medical evidence would not in our considered opinion be sufficient to brush aside the consistent ocular evidence which is cogent and credible. The lathi seized from the appellant vide Ex.P.6 is shown to be a thick lathi which was burnt at one side and had blood like stains. Thus, in our considered opinion, the testimony of Keshar Bai P.W.5, Shyam Sunder P.W.4, Kunnilal P.W.3 and Sahadev P.W.2 is consistent, has stood the test of cross-examination and is fully reliable. The fact that the appellant had struck Bhuda with a lathi also finds corroboration from the F.I.R. which was lodged promptly by Alkharam P.W.1 immediately after the occurrence. Thus, in our considered opinion, the evidence led by the prosecution, establishes beyond doubt that the appellant had caused the death of Bhuda by repeatedly assaulting him by lathi and that the appellant had also voluntarily caused simple injury to Sahadev and Shyam Sunder.

13. The only question which remains for our consideration is as to what offence was committed by the appellant. The evidence led by the prosecution does not establish any motive for the appellant to commit murder of Bhuda ~~which~~ who was not even present on the

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spot when the incident started. The appellant was empty handed and had slapped Kunnilal and upon intervention of Sahadev had perhaps picked up a piece of wood and assaulted Sahadev above the left cheek whereupon Sahadev fell unconscious. The appellant thereafter did not further assault either Kunnilal or Sahadev but ran away. It was only when Bhuda came to the spot to lift Sahadev from the ground that the appellant came to the spot armed with a lathi and assaulted Bhuda on the head whereupon Bhuda also fell down. The appellant thereafter dealt two more lathi blows on the head of Bhuda and thereafter ran towards Keshar Bai P.W.5 to assault her whereupon she ran away. The appellant also wielded a lathi on Shyam Sunder P.W.4 who sustained simple injury. Thus, the manner in which the entire incident occurred does not lead to the inference that the appellant had intended to cause the death of Bhuda. The manner in which the appellant was showing his annoyance to Kunnilal, Sahadev, Bhuda, Keshar Bai and Shyam Sunder clearly shows that the passions had been aroused to such an extent that the appellant was assaulting whosoever came in front of him. Shyam Sunder and Sahadev had sustained only simple injuries. There was no external injury on Kunnilal P.W.3 who had only complained of pain over the left ear which was perhaps as a result of slapping by the appellant. It is thus clearly borne out from the evidence that the appellant had assaulted Bhuda in a sudden heat of passion without any intention of causing his death. However, from the manner in which the appellant had assaulted Bhuda repeatedly on the head and the nature of injuries sustained by ~~the~~ Bhuda, an

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inference can safely be drawn that the appellant had knowledge that by assaulting Bhuda repeatedly on his head he was likely to cause death of Bhuda. In *Mahesh v. State of M.P.* reported in **(1996) 10 SCC 668,** where in a sudden fight after the deceased objected to grazing of cattle the appellant gave blow with a *Pharsa* on the head of the deceased, there was nothing to indicate that the appellant acted in a cruel or unusual manner. It was held by the Apex Court, in the circumstances of the case, that Exception 4 of Section 300 was attracted and conviction of the appellant under Section 304 part-I I.P.C. was upheld and sentence was enhanced to six years rigorous imprisonment and fine of Rs.1,000/-. In *Swaroop Singh v. State of Haryana* reported in **A.I.R. 1995 (SC) 2452,** the appellant had dealt a single blow with a hammer on the head and the medical evidence had shown that the deceased died due to fracture of bone of right temporal parietal region. It was held that the appellant could be clothed with the knowledge that the injury on vital part was likely to cause death but not with any intention to cause death. In *State of M.P. v. Jhaddu and others* reported in **1991 SCC (Cri) 716**, several lathi blows were inflicted by the appellant on vital part like chest resulting in fracture of ribs and laceration of lungs causing death. On facts, it was held that the accused had no intention to kill but they could be imputed with the knowledge that death was likely result. Hence, conviction was altered to Section 304 Part-II and sentence of 10 years R.I. awarded by the High Court was upheld. In *Ravi Kumar v. State of Punjab* reported in **2005 Cri. L. J. 1742** in a sudden fight the accused had picked up *Dhangu* and gave two blows on the head of

the deceased which proved fatal. It was held on the facts and circumstances of the case that accused had acted without premeditation in a sudden fight, and therefore, the accused was liable to be convicted under Section 304 Part-II. It was held by the Apex Court that custodial sentence of 8 years would meet the ends of justice.

14. Applying the law laid down by the Apex Court to the facts of the present case, we find that the fight suddenly started without premeditation when the appellant had slapped Kunnilal. Thereafter, upon intervention by Sahadev, he caused simple injury to Sahadev. Shyam Sunder had also sustained a simple injury. Thus, in this continuing fight the appellant had no intention of causing the death of anyone, therefore, when Bhuda came to lift Sahadev and the appellant dealt a lathi blow on his head and thereafter two more lathi blows when Bhuda fell down, the requisite intention for establishing the guilt under Section 302 I.P.C. could not be attributed to the appellant. For bringing the Exception 4 to Section 300 I.P.C. into operation, it is required to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage or having acted in a cruel or unusual manner. Heat of passion requires that there must be no time for the passions to cool down and in this case the manner in which the appellant went on assaulting Kunnilal, Sahadev and Shyam Sunder and thereafter assaulted Bhuda, shows that there was no time for the passion to cool down. There

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is nothing on record to show that the appellant had acted in a cruel or unusual manner.

15. Considering the factual matrix of the case, we are of the considered opinion that the act of the appellant in causing the death of Bhuda does not travel beyond Section 304 Part II. So far as the conviction of the appellant for offence under Section 323 I.P.C. and sentence awarded thereunder is concerned, they are well founded.

14. In the result, the appeal is partly allowed. The appellant is acquitted of the offence under Section 302 I.P.C. and is convicted under Section 304 Part II of the I.P.C. The appellant was in custody from 30th May 1991 upto 16th January 2001, thus for a period over nine and half years. In our opinion, for the offence under Section 304 Part-II I.P.C. awarding custodial sentence already undergone would meet the ends of justice. We order accordingly. Conviction of the appellant under Section 323 I.P.C. and the sentence awarded thereunder is maintained.

Sd/-
V.K.Shrivastava
Judge

23.08.2005

Sd/-
Dilip Raosaheb Deshmukh
Judge

23.08.2005